(1) Was Aminah binti Haji Mohamed one of the beneficiaries of the estate a minor at the date of the agreement for sale; and
(2) Was the transaction which took place a sale or a lease?

The learned trial Judge found as a fact that there was an agreement for sale and not a lease. He also found that Aminah binte Haji Mohamed was at the date of the agreement of age. None of the other issues raised in the pleadings were considered. The appellant has relied on two grounds of appeal :—

"1. That there was no agreement to sell the land but instead an agreement to seek the permission of the Court to sell the land after such permission had been granted.
2. The learned judge was wrong in holding that he was able in law *to jump* or avoid the condition precedent of seeking an order of the Court for leave to sell *before* making an order to sell the land itself."

As regards ground No. 1, it is perfectly clear that it was an agreement for sale, and what transpired cannot be regarded as amounting only to an agreement to obtain the permission of the Court to sell. The appellant has relied on the decision in the case of *Gan Hong Hoe v. Aziz Beg*[1], and contends that at the highest the respondents are entitled to damages for breach of contract.

Section 45 of the Kedah Administration of Estates Enactment (No. 1) provides :—

"An administrator has power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under section 40, provided that he shall not charge or transfer by sale, gift, exchange or otherwise any immovable property for the time being vested in him without first obtaining the permission of the Court by which the letters of administration were granted."

The appellant has contended that the agreement for sale, if there was one, was void by reason of the provisions of this section. It should be said rather that the agreement is un-enforceable unless the permission of the Court is obtained. In my view, the case of *Gan Hong Hoe v. Aziz Beg*[1], *supra,* is clearly distinguishable from the present case on the facts. In that case the learned trial Judge found that the agreement entered into by the administrator of the estate in question :—

"was not an agreement to sell in the first place but merely an agreement to obtain the permission of the Court to sell, and only to sell after such permission had been granted."

I am not concerned with the correctness of such finding and would only say that in the present case there was a clear agreement for sale.

If the appellant's contention is correct, the only person who can apply for permission to transfer the land belonging to the deceased's estate is the administrator. In my view, this cannot be correct, for an administrator would be able to avoid any agreement he entered into merely by refusing to seek the permission of Court, and the persons with whom he entered into agreements would be powerless to approach the Court and seek permission for the transfer to be permitted. The object of this provision is to protect estates and no more.

Although this point was not argued in the Court below, the learned trial Judge must have been aware of section 45, as it is mentioned in the statement of defence. In my view, his making the order for specific performance of the agreement for sale impliedly gave permission under section 45. Perhaps it would have been better if in the formal order permission to transfer (under section 45) had been included. Had this matter been considered at the trial, there can be no question but that the Court would have given permission. The purchase price was distributed amongst the beneficiaries, with the exception of one who renounced her share in the purchase price, and there was no suggestion that the price paid was anything but fair. Agreements for sale of land can be entered into by administrators, but the transfer of the land in question and the registering of the purchaser cannot be effected until the permission of the Court has first been obtained.

This Court is bound by the decision in the case of *Salmiah binti Haji Taib v. Lim Soo Kok*[2] in which the Court of Appeal agreed with the views expressed by Briggs J. in the case of *Haji Osman bin Abu Bakar v. Sayid Noor bin Sayid Mohamed*[3] that the High Court is empowered, in cases of this kind, to give the permission required under section 45, and if such permission is not given, the Court of Appeal is empowered to do so.

I would dismiss this appeal with costs and order the deposit to be paid to the respondents' solicitors on the usual undertaking.

Appeal dismissed.

Solicitors : *H. E. P. Powell & Co.; Lee Thean-Chu.*

FOO CHIEW FONG v. GURIMAN

[C. A. (Mathew C.J. (F.M.), Whyatt C.J. (S) and Pretheroe J.) November 8, 1956]

[Ipoh — F.M. Civil Appeal No. 18 of 1956]

Subordinate Courts Rules, 1950. O. x. r. 7 — Discretion to direct that party in default be precluded from defending claim — Exercise of discretion — Whether Court of Appeal can interfere with the exercise of discretion.

In this case the learned Magistrate in exercise of his discretion under Order X rule 7 of the Subordinate Courts Rules precluded the defendant from defending the action on the ground that he had not filed his defence within the time limited. The defendant appealed.

Held: (1) the Court of Appeal should not interfere with the discretion of a magistrate acting within his jurisdiction unless the Court is satisfied that he was wrong but the Court of Appeal must if necessary examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order of the Magistrate;

(2) on the facts, this was a case in which the Court of Appeal should interfere with the exercise of a discretion and therefore the appeal must be allowed.

Cases referred to:—

(1) *Evans v. Bartlam* (1937) A.C. 473.

(2) *Gardner v. Jay* 29 Ch. D. 50.

CIVIL APPEAL.

S. P. Seenivasagam for the appellant.

N. Sharma for the respondent.

The judgment below was read by the Ag. Senior Asst. Registrar.

Mathew C.J. (with whom **Whyatt C.J. (S.)** and **Pretheroe J.** agreed) : — The only matter to be considered in this appeal is the exercise of discretion under Order X rule 7 of the Subordinate Courts Rules. This rule reads:—

"If a defence or defence to counterclaim is not filed or does not disclose any defence to the claim or counterclaim, the Court may in its discretion direct that the party in default be precluded from defending the claim or counterclaim. The Court may exercise the same discretion if a defence or defence to counterclaim is filed after due time or is not in proper form."

The discretion is unfettered in its terms, but its exercise is of far-reaching importance, as it precludes a defendant from defending a suit. The case is not tried on its merits, and judgment is obtained by the plaintiff because the defendant has failed to conform with a rule of procedure.

The approach to an appeal of this kind is well stated by Lord Wright in *Evans v. Bartlam*[1], (at p. 486):—

"It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the Court is clearly satisfied that he was wrong. But the Court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The Court must if necessary examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order."

In the present appeal, the appellant says in effect that the exercise of the discretion was not justified on the facts. The appellant was the first defendant in an action, and when the case came on for hearing on 17th August, 1955, he had not been served. The case proceeded and judgment was entered against the second defendant who admitted the claim. The case against the appellant was adjourned until 21st September 1955. When it was called on, the appellant had not been served, and Mr. Sharma for the plaintiff asked for substituted service, and the summons was fixed on the door of the appellant's house with the return date as 5th October, 1955.

On the 5th of October the appellant appeared but had not filed his defence. He asked for a month's adjournment to enable him to employ Counsel and file his defence, and said that he had not returned from Singapore until the 1st of October. Between the 1st and 5th October a Saturday and a Sunday intervened. Mr. Sharma asked the Magistrate to exercise his discretion under Order X rule 7. He urged that the appellant had been avoiding service and that he had not taken the trouble between the 1st and 5th October to apply for an extension of time in which to file his defence. The Magistrate precluded the defendant from defending the action and entered judgment for the plaintiff. In his grounds of judgment the Magistrate said :—

"I came to the conclusion that the defendant's request for adjournment was unjustified and merely for the purpose of delaying proceedings."

It is admitted very properly by Mr. Sharma that nothing can be looked at before substituted service was effected on the 23rd September, 1955. It has not been disputed that the appellant/defendant arrived back from Singapore on 1st October, 1955 and found the summons at his house. It is true that the appellant's request for one month to file his defence was unreasonably long, but he could easily have been given a week, to which Mr. Sharma would not have objected. No injustice would have been done to the respondent who could have been compensated in costs. Courts prefer that cases should be decided on their merits, and do not invoke procedural rules to prevent a defendant from defending an action unless the defendant has no merits in his application for a postponement. The learned Judge on appeal would have regarded the defendant's application with greater favour, had he disclosed his defence at the time he applied for a postponement. But that consideration is not in my view material, as it was not an application to set a default judgment aside, in which case he must disclose an issue to be tried. On the facts which properly could be taken into consideration, I do not think that the Magistrate should have exercised his discretion under Order X rule 7. The hearing was the fifth day after the appellant had received the summons, and a Saturday and Sunday had intervened.

The fact that the defendant had applied for a month's adjournment did not prevent the Magistrate from giving a week's adjournment and costs of the adjournment to the respondent.

As Bowen L.J. said in *Gardner v. Jay*[2], (at page 58):—

> "'That discretion'—(he was discussing the discretion of the judge as regards mode of trial)—'like other judicial discretions must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it, it will be reviewed."

In my view, this is a case in which the Court of Appeal should interfere with the exercise of a discretion, and I would allow this appeal with costs here and in the Court below and order that the deposit be paid out to the appellant.

Appeal allowed.

Solicitors: *S. Seenivasagam & Sons; N. Sharma.*

WHANG TAR CHOUNG v. KWONG FOONG & CO.

[C. A. (Mathew C.J. (F.M.), Whyatt C.J. (S) and Buhagiar J.) June 30, 1956]

[K. L.—F.M. Civil Appeal No. 47 of 1955]

Trade Marks—Application for registration—Onus—Objection—Discretion of Registrar.

This was an appeal against the decision of Wilson J. reported *sub nomine* **Kwong Foong & Co. v. Whang Tar Choung** at p. 31 *ante*. The Court of Appeal over-ruling that decision,

Held: (1) the onus was upon the applicant to satisfy the Registrar of Trade Marks that his mark should be registered;

(2) where the Registrar was satisfied that there were two identical marks being used by the applicant and the opponent and that registration would be likely to cause confusion, his refusal to register would be justified;

(3) where there was objection the Registrar must satisfy himself that the mark should be registered in accordance with the provisions of the Trade Marks Ordinance. If he was not so satisfied, then he must refuse registration.

Case referred to:—

(1) *Pan Press Publication Ltd.* 65 R.P.C. 193.

CIVIL APPEAL.

D. G. Rawson for the appellants.

J. S. H. Skrine for the respondents.

Mathew C.J. (with whom **Whyatt C.J. (S.)** and **Buhagiar J.** agreed):—This is an appeal from a decision of the High Court reversing a decision of the Registrar of Trade Marks, refusing to register the trade mark of the respondents-applicants. In the final paragraph of his decision the learned Registrar said:—

> "The onus is upon the applicant to satisfy me that his mark should be registered. This he has failed to do. I must therefore decide that the application must be refused."

The point at issue is whether the following statement of the law in the learned Judge's judgment is correct:—

> "In my view, it was for the opponents to satisfy the Registrar that the application ought to be refused, and that the Registrar has approached the consideration of this matter from an entirely wrong angle."

There is also a subsidiary point for decision. If the opponent to the registration of a trade mark fails in his objection, is the applicant automatically entitled to registration?

It is agreed by both parties that the material date to look at is the date of application by the applicant for the registration of his trade mark, and in the present case that date was 15th June, 1952. As was said in the matter of application by *Pan Press Publication Ltd.*[1], at 197:—

> "It is no part of the function of the Registrar or of the Court to take into account events which have happened since the material date, or, taking his or its stand as at that date, to speculate as to the future."

The Registrar was satisfied that there were two nearly identical marks being used by the appellants and the respondents and that the registration would be likely to cause confusion. He therefore rightly refused registration, having in mind the provisions of section 23(1) of the Ordinance.

The respondents have submitted that the evidence supporting the objection related only to matters which occurred after the due date. In my view, the evidence supported the contention that the appellant was using a mark on the due date which was nearly identical with the mark used by the respondents.

I would say that where there is an objection the Registrar none the less must satisfy himself that the mark should be registered in accordance with the provisions of the Ordinance. If he is not so satisfied, then he must refuse registration.

I would allow this appeal with costs and restore the decision of the Registrar.

Appeal allowed.

Solicitors: *Shearn, Delamore & Co.; Bannon & Bailey.*